

1 and it's a Commission rule that they have to go through the
2 FOIA. I don't think that we can even debate it.

3 MR. SCHAUDEL: Your Honor, --

4 JUDGE SIPPEL: What I'm trying to get -- I think
5 I'm entitled to know -- I'm trying to get just an
6 understanding as to what the nature and the volume of the
7 information that's been given to them thus far.

8 MR. FENSKE: Your Honor, I don't think there's
9 really a dispute over this by any stretch. They have given
10 us what has been represented to be the most recent -- the
11 complete copy of the most recent inspection report, and when
12 I say "most recent," I'm talking -- and help me out,
13 gentleman, third and fourth quarter of 1997.

14 MR. KNOWLES-KELLETT: During our recess.

15 MR. SCHAUDEL: Second, I think second and third --

16 MR. FENSKE: The most recent, probably the middle
17 of 1997 an inspection of Kay stations was performed and we
18 did receive as is represented what I believe to be a
19 complete copy of that inspection report. I don't want to
20 jump out of turn but, among other things that we'd be
21 looking for are if there are any other inspection reports.
22 But, again, I don't want to jump out of turn. So...

23 JUDGE SIPPEL: No. That's a good question. Are
24 there any other inspection reports?

25 MR. KNOWLES-KELLETT: I think to the extent there

1 are any other inspection reports, they've been the subject
2 of FOIA requests, and all documents that are producible have
3 been produced.

4 JUDGE SIPPEL: Well, I think if he's been entitled
5 to get the latest inspection reports, and I -- I mean, I'm
6 commending that the staff are doing that, because I -- but
7 what would be the problem with giving him earlier reports
8 also, at least that fit within the time frame that we're
9 talking about here, not that would go outside the time frame
10 of this case.

11 MR. KNOWLES-KELLETT: It's CIB's prerogative, Your
12 Honor, not the Wireless Bureau's prerogative to give up the
13 documents. So, by -- those documents are subject to the
14 FOIA rules. That's just how document -- the documents from
15 the Commission go through the FOIA rules. Mr. Kay has had
16 time to propound FOIA requests. He's known about these
17 witnesses for months and months and months, and he has
18 propounded them, and I believe that they have all been
19 produced. So I don't think that there is an open issue by -
20 - to the extent that there is any doubt, he could have and
21 should have propounded a FOIA request. And they are not
22 required to do another search of their files at this time.

23 JUDGE SIPPEL: Well, has that -- has everything --
24 well, that's -- see, I'm not sure as I understand that
25 answer. There was a FOIA request and in response to the

1 FOIA request the most recent inspection report was given?

2 MR. KNOWLES-KELLETT: Well, actually we gave it
3 informally outside the FOIA request, without charging him
4 his dime per page or whatever. But, you know, but for the
5 fact of him not paying \$27, yes, and all previous inspection
6 reports, I think, have been produced that are not somehow
7 exempt from production. He has propounded and CIB has
8 produced volumes of pages to him regarding all other
9 activity. Now, there hasn't been much recent activity as
10 far as I know -- that I'm aware of, and if Mr. Kay's aware
11 of any other specific activity, you know, when there's an
12 inspection, Mr. Kay's aware of it. If there are any reports
13 that he does not have, I'll halfway look into it.

14 JUDGE SIPPEL: All right. Let's here from --
15 that's fine. Let's hear from Fenske on that. What is it in
16 addition to inspection reports that these particular
17 prospective witnesses participated in? What is it more that
18 they are looking for.

19 MR. FENSKE: I hate to give such a broad response,
20 but --

21 JUDGE SIPPEL: That's all right. You can.

22 MR. FENSKE: But we all know that the Commission
23 employees are going to testify about X, Y and Z and we're
24 going to talk about X, Y and Z next week. Presumably, and
25 almost undoubtedly, there are some supporting documents

1 related to the specific topics that they will be called upon
2 to testify. To ask anybody what they are, I don't think you
3 can get an answer because, A, we're not entirely sure what
4 they're going to testify about. So logically we cannot
5 identify -- propose to identify the documents concerning
6 that topic.

7 JUDGE SIPPEL: Well, let me go back and see where
8 --

9 MR. FENSKE: Let me summarize that. Essentially,
10 any documents related to the issues that they're going to
11 testify whether, presumably it's alleged violations of the
12 Commission rules by Mr. Kay. Let's take that as an example
13 that they're going to testify about X, Y and Z violation.
14 Well, presumably there's some written documentation
15 concerning that violation and it is extremely relevant to
16 the proceeding and, in short, that's what we're looking for.
17 And I apologize I can't get into more specifics.

18 JUDGE SIPPEL: All right. Well, that's -- I --
19 you have answered my question to the extent that you can.
20 The notice of the deposition asks for it looks like similar
21 language with respect to the other subpoenas subject to the
22 deposition that I'm looking at. What I'm trying to get to
23 is a Schedule A. It appears to me that the Schedule A
24 that's attached to these notices of the depositions for Mr.
25 Fontaine and Mr. Oei are essentially the same type of

1 Schedule A documents that you've been asking of Mr. Killian
2 and Mr. Barnett with some exceptions. But basically it's
3 the same type of --

4 MR. FENSKE: Yes, that is -- that is correct.

5 JUDGE SIPPEL: I'm going to assume, and you can
6 pursue to a degree on the record with these gentlemen, of
7 course, but basically the documents that these people are --
8 that these men are responsible for or that they've had any
9 connection with in terms of their official duties, vis a
10 vie, Mr. Kay's business is going to be in these inspection
11 reports. If it turns out that, again, this is, I think,
12 appropriate background information with respect to the scope
13 of their knowledge of Mr. Kay's activities, which you're
14 permitted to ask. And if it turns out that there are some
15 other documents or subject areas of documents that you feel
16 that you have not gotten and you're entitled to, then we'll
17 just have to come back to it. But, I think when you are
18 describing this, you're talking about hundreds and hundreds
19 of pages of reports.

20 MR. KNOWLES-KELLETT: That's what's been given. I
21 think CIB has given in excess of thousands.

22 JUDGE SIPPEL: We've talked enough about it. I
23 mean, I know Mr. Fenske is doing his job. He wants to be
24 sure that nothing is getting overlooked here, and he's
25 entitled to do that. So, my ruling with respect to the

1 document request are essentially it's a denial of the
2 documents with the -- the document request is being denied.
3 I made my ruling with respect to -- for background purposes,
4 questions can be asked about their knowledge of the
5 businesses of Mr. Kay, the activities of Mr. Kay and what
6 they may have found violations of Mr. Kay, and the documents
7 all contained in the inspection reports, or is there some
8 other documentation and find out what their answers are.
9 But basically, I'm denying the document requests based on --
10 based on the fact that the Commission rules prescribe only
11 for FOIA, number one.

12 Number two is that you have already received
13 voluminous documents in the form of these inspection
14 reports, which are likely to be the universe of the
15 documents that these inspectors have knowledge of or have
16 possession of vis a vie Mr. Kay.

17 MR. FENSKE: I'll just clarify that last point,
18 and I don't know the honest answer. We have the latest
19 inspection report subject to further review, and I'm not
20 holding anybody responsible for this comment. I don't
21 believe we have any other inspection reports. I could be
22 wrong. So, when Your Honor made the comment inspection
23 reports, we have received the latest inspection reports, and
24 subject to further, you know, further review of files, et
25 cetera, I think we only have the latest. That's the only

1 point I wanted to make.

2 JUDGE SIPPEL: All right. Well, that, you know,
3 again, when we go off the record, you can pursue that again
4 with Mr. Schaubel, Mr. Kellett and then, on the record with
5 these gentlemen, for background purposes and to establish,
6 you know, what they know and what they did and how they went
7 about doing it, I'm sure you'll have that information before
8 you leave California.

9 If you need to make a supplemental request for
10 documentation, we'll consider it then. But I do want to
11 caution so that I'm not leading, you know, I'm not leading
12 you down any kind of -- inadvertently leading you down a
13 path which isn't going to be productive. The FOIA -- the
14 rule is very clear that FOIA is a procedure that needs to be
15 followed, and if you're lacking information with respect to
16 earlier -- earlier inspection reports and those inspection
17 reports have in fact already been asked for under FOIA or
18 come under, you know, some broad description of documents
19 that you have asked for under FOIA, you know, then I would
20 take Mr. Knowles-Kellett up on this, you know, -- but
21 somebody is going to have to go over to the other Bureau and
22 start working with them and try to get that information
23 released to you. But that's the procedure that we would
24 have to follow so, you know, I'll try and work with that as
25 best I can.

1 MR. FENSKE: Understood.

2 JUDGE SIPPEL: All right. I want you to have
3 everything. Believe me, I do, and I appreciate you all
4 coming in and working with me in this way. But I'm very
5 concerned and I do have responsibility for the witnesses.
6 These are third-party witnesses. These are people that are
7 going to be taken away from their business and what not and
8 they are going to be ask some very sharp questions and I
9 just want to be sure that it goes only as far as it has to
10 go.

11 So, that's it. I think that concludes my
12 business. One last question. What about the status of Mr.
13 Jensen, do we know anything more about this man?

14 MR. SCHAUBEL: Your Honor, we've had to -- as a
15 matter of fact, I put a call in to Pat Bell yesterday trying
16 to get some sort of update in terms of where they are in --

17 JUDGE SIPPEL: That's Pacific Bell, that's the
18 telephone company?

19 MR. SCHAUBEL: Telephone company.

20 MR. KNOWLES-KELLETT: No one else has, as far as
21 we know, no one else knows of his location. We've made
22 numerous calls and everybody is looking but they haven't
23 found him yet.

24 JUDGE SIPPEL: Well, he's looking more and more
25 doubtful then --

1 MR. SCHAUBEL: Correct.

2 MR. KNOWLES-KELLETT: Correct, Your Honor.

3 JUDGE SIPPEL: -- from my vantage standpoint. All
4 right. Well, in your status report -- in your status
5 report, I would like a final conclusion reached on that,
6 either you, you know, either you have a viable line of
7 information that you want to pursue or you don't have
8 anything more on this man then we're not going to -- you're
9 just going to exclude him from your witness list so that
10 we're not ... we only want live candidates, those that are
11 available.

12 Anything else that we have today, then, that
13 anybody else wants to raise of this nature?

14 MR. SCHAUBEL: Your Honor, I don't know if this is
15 anything definitive at this point. At some point relatively
16 soon we're going to have to address the question of, you
17 know, once we get through with this round of depositions, go
18 through the process of Mr. Kay naming his rebuttal witnesses
19 and going through the discovery process with respect to any
20 rebuttal witnesses he might have and looking at it from the
21 Bureau's point of view, there may be a possibility -- I
22 believe Your Honor has set March 6th as the close of
23 discovery -- I don't think this is anything definitive at
24 this point, but there may be a possibility that there may
25 need to be a short extension of that date without changing

1 any other dates in this proceeding in order that we have
2 time to conduct any discovery that we need to undertake on
3 Mr. Kay's rebuttal witnesses.

4 JUDGE SIPPEL: All right. Well, we'll -- you
5 know, I'm --

6 MR. SCHAUBEL: I just wanted to bring that to Your
7 Honor's attention.

8 JUDGE SIPPEL: I appreciate that. It doesn't
9 surprise me to hear that because I haven't seen anything yet
10 on the experts and, you know, there's a lot of work to do.
11 You're working very hard. I'm not criticizing. All counsel
12 are working very hard in getting -- preparing for this case,
13 but there is a lot more to do. I don't know, do you have
14 anything to offer at this time, Mr. Fenske? You're not
15 under any obligation.

16 MR. FENSKE: Honestly, no.

17 JUDGE SIPPEL: All right. Well then, we'll leave
18 it at that. We'll just have to take it -- you've got a lot
19 of work to do in the next couple of weeks, and I still have
20 this -- you know, you have left me with this motion to
21 enlarge the issues and so, you know, as all have things to
22 do.

23 I'll get your status report in the middle of
24 February and flag these things that you're talking about.
25 Try and work with each other. I'm sure you'll be out there

1 in California talking to each other, but I'd like to see a
2 firm -- I'd like to see two things. I'd like to see -- in
3 mid-February I'd like to see the definitive identification
4 of those experts. I mean, you have already pretty much
5 disclosed that. And, also a deposition schedule as to when
6 they're going to be taken because they are going to need a
7 lot of time -- they need time, themselves, to prepare and be
8 prepared.

9 Okay. That's it for me then. I'll get an order
10 out this afternoon or tomorrow morning on this. I'm not
11 going to go into great detail, but until -- I'll try and
12 give you as much guidance and clarification as I can.
13 You've already gotten it today, I think. And so, you'll be
14 able to Fax a copy of that up to Mr. Barnett before he shows
15 up for his deposition.

16 Okay. Thank you very much.

17 ALL: Thank you, Your Honor.

18 (Whereupon, at 10:27 a.m. the hearing was
19 concluded.)

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REPORTER'S CERTIFICATE

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HEARING DATE: January 21, 1998
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